No. 93-1958

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARCUS B. FELDMAN,

Petitioner,

v.

ART BAHN, EDWIN LAWRENCE, and HARLAN BENGTSON, Faculty Members at Southern Illinois University at Edwardsville ("SIUE") and Members of the Panel Deciding Plaintiff's Grievance, in their official and individual capacities; CHUNG-WU HO, Chair of the Department of Mathematics and Statistics and EARL LAZERSON, President, in their official and individual capacities; DAVID WERNER, Provost and Vice President of Academic Affairs; LAWRENCE BROWN, Chancellor of Southern Illinois University, and THE MEMBERS OF THE SOUTHERN ILLINOIS UNIVERSITY BOARD OF TRUSTEES, in their official capacities,

Respondents.

BRIEF OF RESPONDENTS ART BAHN, EDWIN LAWRENCE, HARLAN BENGTSON, CHUNG-WU HO AND EARL LAZERSON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether public university official defendants sued in their individual capacities are entitled to qualified immunity from suit when they are alleged to have retaliated against a faculty member by not renewing his probationary faculty contract for bringing to the attention of the defendants concerns about possible fraud or misconduct of a colleague in the latter's research.

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are correctly identified in the Petition for a Writ of Certiorari. In accordance with Rule 24.2 of the Rules of the Supreme Court, a list of those parties is omitted here.

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OPINIONS BELOW

The opinions, orders, and judgments of the courts below are correctly cited or included in the Petition for a Writ of Certiorari. In accordance with Rule 24.2 of the Rules of the Supreme Court, the citations are omitted here.

JURISDICTION

The jurisdiction of the United States Supreme Court is correctly invoked as recited in the Petition for a Writ of Certiorari. In accordance with Rule 24.2 of the Rules of the Supreme Court, the statement of the grounds on which jurisdiction is invoked is omitted here.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are correctly cited in the Petition for a Writ of Certiorari. In accordance with Rule 24.2 of the Rules of the Supreme Court, the statement of constitutional provisions and statutes involved is omitted here.

STATEMENT OF THE CASE

It is necessary to supplement Petitioner's Statement of the case as follows:

Petitioner's statement of the case failed to comply with Rule 14.1(g) of the Rules of the Supreme Court because Petitioner went beyond the Rule's requirement of facts material to the consideration of the questions presented. Petitioner, by characterizing certain parts of the decision of the Court of Appeals below, presents argument regarding the decision which is not appropriate for a statement of the case. See Petition at page 5. These characterizations of the Seventh Circuit's decision reappear in Petitioner's argument where they appropriately belong and Respondents have addressed them in Respondents' argument.

Also, Rule 14 of the Rules of the Supreme Court requires that questions presented for review should be short and concise and should not be argumentative or repetitious. The questions presented by Petitioner are neither short nor concise and are

argumentative. The proper question presented is set forth in the first page of this brief.

At page 4 of Petitioner's Petition he states that: "Ho told the colleague whose research claims Feldman had questioned, that Ho would retaliate against any who went against her for tenure."

In fact, the Petitioner alleged that while Dr. Ho and the accused colleague were in Ho's office, Feldman overheard Dr. Ho tell the colleague, "If anyone goes up against you, I will chew them with nails." There is no mention of tenure or retaliation regarding tenure in the statement allegedly attributable to Ho. Petition at A-19.

Plaintiff filed a complaint on June 5, 1992 alleging that Defendants violated his First Amendment rights by failing to renew his employment contract as a non-tenured faculty member of the Mathematics Department of Southern Illinois University at Edwardsville. Plaintiff alleged that his contract was not renewed because he brought to the attention of his department chair what Plaintiff described as, "concerns about possible fraud or misconduct of a colleague in scholarship or research." Petition at A-19. From September of 1986 to June 15, 1992, Plaintiff was a non-tenured, assistant professor serving under a probationary faculty contract with the Department of Mathematics at Southern Illinois University at Edwardsville. Petition at A-15.

In the spring of 1990, the Promotion and Tenure Committee for the Southern Illinois University at Edwardsville Mathematics Department reviewed the employment of all non-tenured faculty members and recommended that Plaintiff be presented a terminal contract.

Dr. Ho complied with the Committee recommendation to terminate Feldman's contract and sent it to the Dean of the College of Arts and Sciences, Donal Myer (now deceased). Petition at A-20.

Southern Illinois University at Edwardsville maintains a faculty grievance procedure wherein a hearing committee is appointed to hear a grievance and facts related to its proper disposition, make findings of fact, and make a recommendation to the University President. Defendants Bahn, Lawrence and Bengtson submitted written recommendations to University President, Earl Lazerson, that the Promotion and Tenure Committee's decision to issue Plaintiff a terminal contract be upheld. Petition at A-21.

Under the grievance procedure, President Lazerson must either accept or reject the decision of the Grievance Hearing Committee. After receiving the grievance committee's recommendation and reviewing the record, President Lazerson denied Plaintiff's grievance and upheld the recommendation of the Promotion and Tenure Committee to issue Plaintiff a terminal contract. Petition at A-22.

Defendant James Brown, Chancellor of Southern Illinois University was charged with recommending to the Board of Trustees of Southern Illinois University that the Board grant or deny appeals of the President's decision on faculty grievances. Chancellor Brown concurred with President Lazerson's decision to affirm the termination of Plaintiff's employment and so recommended to the Board of Trustees of Southern Illinois University. Petition at A-23.

The Members of the Board of Trustees of Southern Illinois University denied Plaintiff's appeal. Petition at A-23.

On July 6, 1992, Defendants filed a Motion to Dismiss based on qualified immunity. The district court denied the motion. Petition at A-9. On January 27, 1993, Defendants filed a Motion to Reconsider the denial of the motion. On March 10, 1993, the court granted the Motion to Reconsider but again entered an order denying Defendants' Motion to Dismiss. Petition at A-11 and A-12. Defendants filed a Notice of Appeal on April 8, 1993.

Oral argument was heard on November 3, 1993. On December 29, 1993 the Seventh Circuit issued an opinion reversing the district court and granted qualified immunity to the defendants sued in their individual capacities. Petition at A-1.

Plaintiff filed a Petition for a Writ of Certiorari on June 7, 1994.

SUMMARY OF ARGUMENT

The U.S. Supreme Court should not grant Petitioner's request for a writ of certiorari.

First, the Seventh Circuit correctly decided that the Defendants sued in their individual capacities were entitled to qualified immunity. The law was *not* clearly established that what defendants are alleged to have done violated Petitioner's constitutional rights or that Petitioner's speech was speech upon matters of public concern.

Second, the Seventh Circuit's decision does not suggest issues of national importance or threaten the protection of the free exchange of ideas at academic institutions. The Court of Appeals decided only the qualified immunity issue. The issue of a constitutional violation remains open.

Third, the Seventh Circuit's decision does not conflict with *Anderson* v. *Creighton* or with other circuit court opinions. The Seventh Circuit's decision is consistent with *Anderson* and the cases cited by Petitioner as in conflict are distinguishable.

Therefore, no special or important reasons exist for this court's review on a writ of certiorari. See Rule 10 of the Rules of the U.S. Supreme Court.

ARGUMENT

I. THE DEFENDANTS SUED IN THEIR INDIVIDUAL CAPACITIES WERE ENTITLED TO QUALIFIED IMMUNITY.

Plaintiff alleged retaliation by the Defendant state university officials for the following conduct: "... brought to the attention of Defendant Ho his (Plaintiff Feldman's) concerns about possible fraud or misconduct of a colleague... in her research, as he believed the upcoming tenure vote on her made it incumbent upon him to do so."

The Seventh Circuit Court of Appeals correctly held that the Defendant university officials sued in their individual capacities were entitled to qualified immunity for their alleged roles in the nonrenewal of Feldman's probationary faculty contract, that is, Ho, in his role as department chairman, and the others in their roles as appellate decision makers. *Feldman* v. *Bahn*, 12 F.3d 730 (7th Cir. 1993).

The Seventh Circuit's decision was correct because the Defendants, even assuming that the nonrenewal decision was made because of Feldman's accusations as the Court of Appeals assumed, 12 F.3d at 731, did not, based upon the allegations of the complaint, violate clearly established rights of which the Defendants reasonably would have known. *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

Not only was Plaintiff's alleged speech not speech upon a matter of public concern, *Connick* v. *Meyers*, 461 U.S. 138 (1983) but the law regarding Plaintiff's alleged speech as protected speech was not clearly established. *Harlow*, 457 U.S. at 818 and *Anderson* v. *Creighton*, 487 U.S. 635 (1987). Further, the law regarding First Amendment liability for the allegations against the Defendants who acted in the capacity of reviewing the Plaintiff's grievance was not established at all. No case has

addressed the constitutional liability of a grievance hearing committee and the president of a university in their roles of hearing, reporting on, and reviewing a decision not to renew a probationary faculty contract.

The individually sued Defendants, even based upon the allegations of the complaint, could not have know that their conduct violated Plaintiff's constitutional rights, even if ultimately a court or jury determines that it did. *Anderson*, 483 U.S. at 638-639.

Therefore, while the Seventh Circuit opinion may not have been structured along traditional analytical lines for a qualified immunity review, the result was correct and does not call for U.S. Supreme Court review.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT IMPLICATE ISSUES OF NATIONAL IMPORTANCE OR POSE A THREAT TO THE FREE EXCHANGE OF IDEAS AT ACADEMIC INSTITUTIONS.

The only effect of the Court of Appeals decision was to grant correctly qualified immunity in one case to five university officials sued in their individual capacities for alleged First Amendment violations. The decision hardly implicates a question of national importance. The decision has no impact beyond the case itself because it only decided the question of qualified immunity.

Contrary to Plaintiff's overstatement of the impact of the decision, the substantive question of First Amendment liability was not decided. The district judge or a jury remains free to decide whether Plaintiff's First Amendment rights were violated by Defendants' conduct.

Contrary to Plaintiff's assertion in his petition, the Court of Appeals did not decide that public university officials cannot be

held liable for terminating a faculty member solely because of the faculty member's good faith questioning of the legitimacy of a colleague's research claims. Petition at page 7.

First, even a cursory reading of the Seventh Circuit's opinion demonstrates that the court only decided the qualified immunity question, not the question of whether Plaintiff's First Amendment rights were violated and appropriate relief therefor. Second, the court's opinion does not foreclose the possibility that Defendants may be held liable in their official capacities and appropriate relief accorded to Plaintiff on that basis. Third, Plaintiff overstates the importance of his case in his petition wherein he suggests that protection for whistleblowers is denied by the Seventh Circuit's decision. That is simply not the case. As stated, Plaintiff has not been and will not be denied relief if he prevails. He will only be foreclosed from money damages. Also, Plaintiff appears to assume that he is a whistleblower entitled to protection and that this case implicates such concerns. Plaintiff's assumption presumes the truth of Plaintiff's allegations against his colleague — an assertion which even Plaintiff does not allege. See Plaintiff's amended complaint at Petition A-15 to A-25.

Further, Plaintiff's argument in his petition assumes facts which are not supported by the record and suggests that the court review the Seventh Circuit decision on that basis. Plaintiff alleged that whistleblowers are usually retaliated against. Petition at page 8. No evidence supports this assertion even if Plaintiff can properly claim whistleblower status. The Seventh Circuit thought otherwise. 12 F.3d at 733.

Plaintiff also asserts that the court should grant review to clarify whether when public officials have terminated faculty members for speech that the officials must present evidence that they actually balanced competing interests before they can be granted qualified immunity. This assertion is without legal

support. First, the question Plaintiff presents is not the question asked in a qualified immunity analysis. The question presented by Plaintiff is better addressed after trial because Plaintiff's question presumes Plaintiff was terminated for his speech and that his speech was protected. Neither of those propositions has been established and the Seventh Circuit correctly rejected the latter for qualified immunity purposes.

Again, Plaintiff overstates his case. Public officials do risk personal liability in cases in which they retaliate for the exercise of First Amendment rights when those rights are clearly established. Protection exists under the law. Plaintiffs who are subject to violation of their clearly established First Amendment rights have available to them the full measure of legal relief. In fact, even those Plaintiffs who prove First Amendment violations against defendants who have been granted qualified immunity still have relief available, i.e. prospective injunctive relief.

Thus, the serious national implications Plaintiff perceives to justify review by the U.S. Supreme Court do not exist. The case as presented by Plaintiff does not suggest special and important reasons for U.S. Supreme Court review.

Similarly, the Plaintiff's argument that the Seventh Circuit's decision conflicts in principle with twenty-five years of Supreme Court protection of the free exchange of ideas at academic institutions is unsupported. The Seventh Circuit did not freely grant qualified immunity to university officials. The Seventh Circuit took the allegations of the complaint as true and determined that the five Defendants sued in their individual capacities were entitled to qualified immunity and, in substance, determined that as presented in the complaint the alleged conduct of Defendants did not violate a clearly established right of which the Defendants should have known. 12 F.3d at 731, 733. This hardly conflicts with twenty-five years of Supreme Court decisions "heralding and protecting the free exchange of ideas at academic institutions." Petition at page 11.

Plaintiff's complaint does not implicate the free exchange of ideas at academic institutions. Plaintiff's complaint merely alleges that he brought concerns about possible fraud or misconduct of a colleague in her research within the context of an upcoming tenure vote on the colleague. This allegation hardly implicates the free exchange of ideas at academic institutions. In fact, the complaint indicates no issue of a threat to the free exchange of ideas at any academic institution. Plaintiff acknowledges this in his petition at page 12 where he clearly states the cases cited there address the scope of the right to free speech not qualified immunity. The protection of free exchange of ideas at academic institutions is not at risk because of the Seventh Circuit's opinion in this case. Plaintiff remains free to prove a First Amendment violation and obtain relief therefor. All the Seventh Circuit Court of Appeals decision effected was qualified immunity for five defendants sued in their individual capacities. As the Seventh Circuit recognized, "There is no 'clearly established' right - there is no right, period - to defame a fellow member of the faculty." 12 F.3d 733.

No reasonable construction of the Seventh Circuit's opinion could lead anyone to conclude that the Seventh Circuit's decision conflicts with this court's decisions protecting the free exchange of ideas at academic institutions.

III. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *ANDERSON V. CREIGHTON* OR WITH OTHER CIRCUIT COURT OPINIONS.

Plaintiff states that the Seventh Circuit's opinion conflicts with *Anderson* v. *Creighton*, 483 U.S. 635 (1987), by establishing a rule granting immunity to university officials without an objective fact specific analysis. Plaintiff accuses the Seventh Circuit of reasoning from the premise that free speech balancing is a complicated process which university officials always carry out, to the conclusion that because these issues inherently involve balancing the law cannot be clearly established and,

therefore, immunity should be granted. While university officials who make difficult and risky employment decisions everyday would be thrilled with such a rule, Respondents suggest that Plaintiff misapprehends the Seventh Circuit's decision.

While the Seventh Circuit could well have reasoned, and still have been within a principled qualified immunity analysis, that University officials will appropriately balance competing interests, the court instead assumed that the recommendation not to renew Plaintiff's probationary faculty contract was because of his accusations rather than his scholarship and teaching. 12 F.3d at 731. This wipes away the argument that the court did not make a fact specific analysis based upon Plaintiff's complaint.

Plaintiff's argument that the Seventh Circuit relied on an *a priori* assumption that university officials will balance interests in a speech case and, therefore, a review of the facts of the case is not necessary, does not accurately present the approach taken by the Seventh Circuit and, therefore, does not serve as a basis to justify Supreme Court review.

While the Seventh Circuit did not undertake a traditional analysis of qualified immunity, i.e. determining whether the law was clearly established at the time that Plaintiff's speech was speech upon a matter of public concern, the court did acknowledge Plaintiff's and Defendants' arguments as the parties presented them in a qualified immunity context. 12 F.3d at 732. The court further held there was no clearly established right to make accusations against a fellow member of the faculty and that in its review of all the questions raised by the complaint, determined there were no categorical answers. The court's language correctly reflects its view that as presented in his complaint, Plaintiff alleged facts which did not establish the violation of a clearly established constitutional right of which the individually sued Defendants would have known and that qualified immunity was appropriate.

The court also suggested that assuming Defendants took into account Plaintiff's speech, which is an assumption favorable to Plaintiff, the balancing approach required by *Pickering* [*Pickering* v. *Board of Education*, 391 U.S. 563 (1968)] in a case like this one justified immunizing the Defendants. 12 F.3d at 733, 734. The court correctly determined that based upon the issues raised by the Complainant's complaint, qualified immunity was essential.

In support of Respondents' arguments, the Supreme Court has recently recognized that government employment decisions do not implicate the same level of concern regarding First Amendment expression as actions of the government as sovereign. In *Waters v. Churchill*, ___ U.S. ___, 62 LW 4397 (92-1450) decided May 31, 1994, this Court recognized that government as an employer has broader powers than government as sovereign. 62 LW 4400. The court made clear that the government has greater power as an employer in the First Amendment arena than it has as sovereign because in the latter case the government is a regulator and in the former case the government is merely an employer. As the court pointed out, the extra power the government has in the First Amendment arena with regard to employment comes from the nature of the government's mission as an employer versus its role as a governmental authority in a free society which demands greater restriction.

To be sure, *Waters* dealt with a different issue than is presented in the *Feldman* case. However, the *Waters* opinion serves to recognize that an employment decision made by a governmental entity, whether it is a university or any other governmental entity, does not rise to the same level of importance as a First Amendment decision in which the government acts as sovereign. Further, the test devised in *Waters* supports Judge Easterbrook's analysis in the Seventh Circuit opinion and allows for Judge Easterbrook's characterization of what the complaint revealed about what went on in the *Feldman* case. See *Waters*,

supra, 62 LW 4402. The court in *Waters* did not reach the question of qualified immunity. 62 LW 4403.

Respondents contend that Petitioner's argument that the Seventh Circuit's grant of qualified immunity in this case conflicts with the Second, Tenth and Eleventh Circuits is simply not correct and therefore should not serve as a basis for Supreme Court review in this case. First, the Petitioner cites *Dube* v. *The State University of New York*, 900 F.2d 587 (1990) in which the Second Circuit denied qualified immunity to university officials who denied tenure allegedly based upon the professor's discussion of controversial issues in the classroom. The *Feldman* case has nothing to do with the character of the First Amendment expression in *Dube*. Feldman, based upon the complaint, was not retaliated against because of the discussion of controversial topics in the classroom. Unlike *Dube*, in *Feldman*, we are not confronted with either a discussion of controversial topics in a classroom or facts from which a jury could find that defendants denied tenure and promotion in response to pressure exerted by government officials and community activists outraged by a professor's teachings. Also, Feldman's case involved nonrenewal of a probationary contract, not a tenure decision.

Petitioner suggests that the *Feldman* decision is in conflict with *Jefferies* v. *Harleston*, ___ F.3d. ___, 9 IER 686, 1994 WL 143448 (1994) in which the Second Circuit denied qualified immunity to university officials who were alleged to have deprived Jefferies of his position as department chair based upon his speech. *Jefferies* can easily be distinguished. In *Jefferies*, the speech at issue was a public address to an audience outside the affiliation with the governmental employer and involved criticism of racial and ethnic classes Jefferies perceived in the public school curriculum. Jefferies speech, which was also broadcast on television, is in no way similar to Feldman's in form, content or context.

Further, *Jefferies* was decided before *Waters* which acknowledged the difference of government as employer and government as sovereign in the context of First Amendment issues. Also, the Court of Appeals decision in *Jefferies* involved the *Pickering* balance, an issue not reached in the *Feldman* decision and the court concluded that Jefferies' speech unquestionably involved matters of public concern. Clearly, the Seventh Circuit decision in *Feldman* and the Second Circuit decision in *Jefferies* do not present a conflict between circuits which justifies Supreme Court review of the *Feldman* decision.

Finally, Plaintiff cites for the alleged Tenth Circuit conflict, *Powell* v. *Gallentine*, 992 F.2d 1088 (1993). Powell involved an allegation that Powell was discharged in retaliation for publishing allegations of grade fraud concerning a class taught by an adjunct professor in 1990 under Powell's supervision. As the court stated in the *Powell* case, the plaintiff's allegations of grade fraud which sought to bring to light actual or potential wrongdoing or breach of public trust on the part of the defendant university officials, was determined to be a matter of public concern. Such was not the subject matter of Feldman's alleged speech and, in fact, the *Powell* court does not cite any case from any jurisdiction which stood for the proposition that allegations of grade fraud were matters of public concern. The soundness of the decision of the *Powell* court must be questioned on this basis alone. However, the content and purpose of Powell's allegations were far different than those of Feldman. Feldman did not seek to bring to light actual or potential wrongdoing or breach of public trust on the part of the officials who administer the University. Instead, Feldman attacked a colleague. Also, rather than allege grade fraud, Feldman only brought concerns about possible fraud or misconduct of a colleague in her research in the context of an internal department tenure vote. The *Feldman* and *Powell* decisions hardly establish a conflict between circuits which supports Petitioner's petition for a writ of certiorari.

Although Petitioner alleges a conflict with the Eleventh Circuit, no Eleventh Circuit decision is cited in Petitioner's Petition; therefore, Respondents do not address the alleged conflict involving the Eleventh Circuit.

Finally, Respondents disagree that the cases demonstrate a strong reluctance to grant university officials qualified immunity. For example, in *Garvie* v. *Jackson*, 845 F.2d 647 (6th Cir. 1988) the court immunized university administrators in a free speech retaliation case involving criticism of faculty departmental actions. See also, *Griffen* v. *Thomas*, 929 F.2d 1210 (7th Cir. 1991) involving complaints about assignments and evaluations which were held not to be matters of public concern; and, *Dorsett* v. *Board of Trustees*, 940 F.2d 121 (5th Cir. 1991) which held that intra-faculty disputes about academic standards, assignments, equipment, and teacher recognition did not rise to the level of matters of public concern.

CONCLUSION

For the reasons set forth in this Brief, Respondents respectfully request this court deny Petitioner's petition for a writ of certiorari.

Respectfully submitted,

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